141 - 648

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1059~~. 708 ~~395~~ 72

JAMES C. THOMPSON, PLAINTIFF IN ERROR,

vs.

GEORGE W. BAKER AND H. B. SCHULER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTERN DISTRICT OF TEXAS.

FILED AUGUST 9, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1053.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTERN DISTRICT OF TEXAS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 13, 1888.

1 January Term, 1888.

MONDAY, *January* 9, 1888.

Be it remembered that there was opened and begun to be holden a regular term of the United States circuit court for the fifth circuit and northern district of Texas, at the city of Dallas, in Dallas county and said circuit and district, on the 9th day of January, A. D. 1888, it being the second Monday in said month in said year and the day fixed by law for commencing a regular term of said court at said place—present and presiding, the Honorable Andrew P. McCormick, United States district judge for the northern district of Texas; Charles B. Pearre, United States attorney for said district; W. L. Cabell, United States marshal for said district, and A. J. Houston, clerk of said court—when and where the following proceedings were had, to wit:

2 *Petition.*

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

JAMES C. THOMPSON
vs.
GEORGE W. BAKER *et al.* } No. —.

To the honorable judges of said court:

The petition of James C. Thompson, who resides at the city of Sedalia, in the State of Missouri, and who is a citizen of said State of Missouri, complaining of George W. Baker, who resides in the county of Clay, in the State of Texas, and who is a citizen of said State of Texas, and of H. B. Shuler, who resides at the county of Cowley, in the State of Kansas, and who is a citizen of said State of Kansas, respectfully shows—

That on the 5th day of August, 1886, plaintiff was lawfully seized and possessed of the tract of land hereinafter described, situated in the county of Clay, in the State of Texas, holding the same in fee simple; that on the day and year last aforesaid the defendant, George W. Baker, entered upon said premises and ejected plaintiff therefrom and unlawfully withholds the same from plaintiff's possession, to plaintiff's damage ten thousand dollars.

That the premises so entered upon and unlawfully withheld from plaintiff by said defendant are described as follows: Lying in Clay county, Texas, being subdivision- number- two, three, and four of the William W. Yearley surveys of land, lying in the southern por-

3 tion of Clay county, Texas, about eleven miles from Henrietta, both of said surveys containing thirty-three hundred and ninety-six (3,396) acres, one being patented to William W. Yearley and the other to the heirs of William W. Yearley, and being designated by certificates numbers eighteen hundred and seventy-six (1876) and one hundred and eighty-nine (189), bounded as follows, to wit:

Beginning at the southeast corner of subdivision number two (2) out of the nineteen hundred and twenty (1,920) acre survey and running thence north with the east boundary line six hundred and eighty-seven (687) varas; thence east four hundred and thirty (430) varas; thence north on the west boundary line of subdivision number five (5) of said Yearley lands twenty-one hundred and fifty-one (2,151) varas; thence east on the north boundary line of the original William W. Yearley survey of nineteen hundred and twenty (1,920) acres thirty-one hundred and six (3,106) varas to the northwest corner of said survey; thence south on the west boundary line of the original survey for nineteen hundred and twenty (1,920) acres twenty-eight hundred and thirty-seven (2,837) varas to the southwest corner of subdivision number two (2); thence east with the south boundary line of subdivision number two (2) twenty-six hundred and seventy-six (2,676) varas to the place of beginning, containing seventeen hundred and twenty-nine (1,729) acres, more or less. That said land sued for is of the value of $6,000.00 and upwards; that the annual rental value of said land is $500.00.

Plaintiff shows that said H. B. Shuler is claiming some
4 kind of title to said land, and also claims the right to the possession of the same; wherefore plaintiff sues and prays that said defendant, George W. Baker, and said defendant, H. B. Shuler, be cited according to law; that plaintiff have judgment for restitution of the above-described premises, and for damages and all costs of suit and general relief.

SWAN & BOMAR,
CRAWFORD & CRAWFORD,
Attorneys for Plaintiff.

(Endorsed:) No. 1080. James C. Thompson *vs.* George W. Baker *et al.* Plaintiff's original petition. Filed Feb'y 25, 1887. A. J. Houston, clerk. Crawford & Crawford, att'ys.

Amended Answer.

In U. S. Circuit Court, at Dallas.

JAMES C. THOMPSON
vs.
GEO. W. BAKER *at al.* } No. 1080.

Now comes the defendant, H. B. Shuler, and, by leave, amends his original answer filed herein May 20, 1887, and thereupon pleads as follows:

1st. That defendant is not guilty of the matters charged in plaintiff's petition, & of this he puts himself upon the country.

2d. The said defendant, by way of reconvention, avers that he is the owner in fee & entitled to the possession of the lands described in plaintiff's petition, & was such owner & so entitled on Jan'y 1,
1887, when the said plaintiff wrongfully entered upon said
5 premises and violently ejected defendant, and from thence hitherto the said plaintiff has wrongfully & unlawfully with-

held from defendant the possession thereof, to his damage five thousand dollars; wherefore defendant prays for judgment against said plaintiff for said land, for damages, writ of restitution, & costs, & so, &c.

ROBERTSON & COKE,
Counsel for H. B. Shuler.

(Endorsed:) No. 1080. James C. Thompson *vs.* H. B. Shuler *et al.* Amended original answer & plea in reconvention of H. B. Shuler to try title as well as for damages. R. & C., for Shuler. Filed Jan'y 16, 1888. A. J. Houston, clerk, by Jas. D. Adams, dep-ty.

Agreement and Statement of Facts.

In U. S. Circuit Court, at Dallas.

JAS. C. THOMPSON
vs.
G. W. BAKER & H. B. SHULER. } No. 1080.

The parties to the above cause waive a jury & agree on the following facts:

Both the plaintiff, Thompson, and the defendant, Shuler, claim title to the land in controversy under the defendant, Baker, as a common owner. On Aug. 30, 1884, Baker made a deed of general warranty, conveying the land to Looney Ledbetter, reciting a consideration of 8,225 dollars, evidenced by three promissory notes, each for one-third of said sum and due, respectively, Sept. 1, 1885, Sept. 1, 1886, & Sept. 1, 1887. This deed was made to defraud creditors, particularly H. B. Shuler, who then held the note of said Baker & others for 10,000 dols., which was an actual & *bona fide* demand against said Baker & others, existing long prior to Aug. 30, 1884. Said deed was never delivered to Ledbetter, but was put on record by Baker on Sept. 29, 1884. This deed expressly reserved a vendor's lien. Before this deed was made Ledbetter, who was a single man & nephew of Baker, lived with Baker on the land & had 40 head of cattle on the land in controversy. After the deed was made Ledbetter continued to live with Baker as before, & as before kept his cattle on the land. Baker also had 300 head of cattle on the land.

On May 9, 1885, Ledbetter made and delivered to J. N. Israel a general warranty deed, conveying the land in controversy, reciting a consideration of 10,000 dols. cash. On the same day Baker executed a release of his vendor's lien; the deed & release were both acknowledged May 9, 1885. On May 11, 1885, Baker executed to Israel a quitclaim deed to the land. No consideration was paid by said Israel to Baker or Ledbetter for said conveyances, but of this Thompson knew nothing, but said instruments were recorded May 14, 1885. On Aug. 1, 1885, plaintiff Thompson loaned J. N. Israel 5,000 dols., for which Israel executed his note, secured by mortgage on the land. Default having been made, Thompson filed in this

court his bill against Israel to foreclose the mortgage. On June 16, 1886, a decree was entered in his favor, under which the land was sold by the marshal on Aug. 3, 1886, at which sale plaintiff Thompson became the purchaser. The deed from the marshal to Thompson was recorded Sept., 1886.

7 On Sept. 24, 1884, the defendant, Schuler, on his demand aforesaid for 10,000 dollars, instituted suit in the district court of Clay county against Baker & others, & on the same day sued out an attachment, and the writ was on the same day levied upon the land in controversy as the property of Baker. This suit was, on the application of Schuler, removed into this court, where the transcript was filed Dec. 4, 1884. On the next day Schuler sued out in this court another writ of attachment in the same case, and it on the same day was levied upon the land in controversy as the property of Baker. On January 12, 1886, judgment was rendered in favor of Schuler against Baker & others for the debt sued on, with foreclosure of the attachment lien, under the writ issued out of this court Dec. 5, 1884. The judgment recites that the attachment lien, as it existed Dec. 5, 1884, is foreclosed, and the writ issued in State court was not foreclosed in the judgment or mentioned in any way. Upon this judgment order of sale issued, and sale was made June 1, 1886, at which sale Schuler became the purchaser, and deed from marshal to Schuler was recorded June 4, 1886.

At the date of plaintiff's mortgage he, plaintiff, loaned & advanced to Israel 5,000 dols. upon the faith of said mortgage and had no notice of the fraudulent intent of Baker in making deed to Ledbetter or of the want of consideration or other infirmity therein, except such as the law imputed to him from the deeds themselves & from Schuler's attachments. At the date of the mortgage Thompson had no actual notice of any defect in the title. The writs

8 of attachment in Schuler *vs.* Baker *et al.* were properly sued out, issued, & levied & by proper officers, & the lien on the land in controversy under the writ of Dec. 5, 1884, was duly & regularly foreclosed. Neither Thompson, Ledbetter, nor Israel were parties to said suit. The foreclosure proceedings under the mortgage from Israel to Thompson were regular, but Schuler was not a party. All the deeds & mortgage and release above mentioned are recorded in Clay county, where the land is situated. The land in controversy is of the value of 8,000 dols.

We agree that the court may find the foregoing as the facts in this case.

Dec. 29, 1887.

CRAWFORD & CRAWFORD,
Counsel for Plaintiff.
ROBERTSON & COKE,
Counsel for H. B. Schuler & G. W. Baker.

The court finds all the facts stated in the above agreement to be the facts in this case, and upon consideration of the same orders judgment to be entered that the plaintiff take nothing by his suit,

and that the defendant, H. B. Schuler, recover the land upon his cross-action, and to this judgment of the court the plaintiff excepts.

A. P. McCORMICK,
U. S. Dist. Judge.

(Endorsed:) No. 1080. James C. Thompson *vs.* H. B. Schuler & G. W. Baker. Agreement. Filed Jan'y 16, 1888. A. J. Houston, clerk, by Jas. D. Adams, dep-ty.

9 *Judgment.*

In the United States Circuit Court for the Northern District of Texas, at Dallas.

From the Minutes, January Term, 1888.

JAMES C. THOMPSON
vs.
GEORGE W. BAKER *et al.* } No. 1080.

TUESDAY, *January* 17, 1888.

On this day came on to be heard the above-entitled cause, and the parties having announced ready for trial, a jury was waived by agreement in writing filed, and the cause was submitted to
10 the court upon an agreed statement of facts; and the court having found the facts as set out in said agreement, upon a consideration of the same, is of opinion that the law arising upon said facts is in favor of the defendants. It is therefore considered and adjudged that the plaintiff take nothing by his said suit, and that the defendants, G. W. Baker and H. B. Schuler, go hence without day and recover of plaintiff all costs in this behalf expended, for which let execution issue. And it further appearing to the court, upon consideration of said facts so found by the court, that the defendant, H. B. Schuler, on his cross-action, is the owner of the land in controversy, it is considered and adjudged that said H. B. Schuler do have and recover of said J. C. Thompson the said land in controversy, described as follows: Lying in Clay county, Texas, being subdivision- number- two, three and four of the William W. Yearley surveys of land, lying in the southern portion of Clay county, Texas, about eleven miles from Henrietta, both of said surveys containing thirty-three hundred and ninety-six acres, one being patented to William W. Yearley and the other to the heirs of William W. Yearley, and being designated by certificates numbers eighteen hundred and seventy-six (1876) and one hundred and eighty-nine (189), bounded as follows, to wit: Beginning at the southeast corner of subdivision number two (2) out of the nineteen hundred and
11 twenty (1,920) acre survey and running thence north with the east boundary line six hundred and eighty-seven (687) varas; thence east four hundred and thirty (430) varas; thence north on the west boundary line of subdivision number five (5) of said Yearley lands twenty-one hundred and fifty-one (2,151) varas; thence

east on the north boundary line of the original William M. Yearley survey of nineteen hundred and twenty (1,920) acres thirty-one hundred and six (3,106) varas to the northwest corner of said survey; thence south on the west boundary line of the original survey for nineteen hundred and twenty (1,920) acres twenty-eight hundred and thirty-seven (2,837) varas to the southwest corner of subdivision number two (2); thence east with the south boundary line of subdivision number two (2) twenty-six hundred and seventy-six (2,676) varas to the place of beginning, containing seventeen hundred and twenty-nine (1,729) acres, more or less; and that he may have his writ of restitution and recover of said Thompson all costs in said cross-action.

To all of which judgment said plaintiff Thompson excepts.

12 *Motion for New Trial.*

In the U. S. C. C., Dallas, Texas.

J. C. THOMPSON
vs.
G. W. BAKER *et al.* } 1080.

Now comes the plaintiff in this cause and moves the court to grant him a new trial for the reason that upon the facts as agreed to by the parties and found by the court the judgment should have been for the plaintiff and not for the def't, Schuler.

The court erred in not rendering judgment for the plaintiff.

CRAWFORD AND CRAWFORD,
Att'ys for Pl'ffs.

(Endorsed:) No. 1080. J. C. Thompson *vs.* G. W. Baker *et al.* Motion for new trial. Motion docket #25. Filed Jan'y 19, 1888. A. J. Houston, clerk.

Judgment on Motion for New Trial.

In the United States Circuit Court for the Northern District of Texas, at Dallas.

From the Minutes, January Term, 1888. Thursday, Febr'y 16, 1888.

JAS. C. THOMPSON
vs.
G. W. BAKER *et al.* } 1080.

JAN'Y 23, 1888.

This day came on to be heard the plaintiff's motion for a new trial, and the court being fully advised in the premises, it is ordered that said motion be overruled. It is further ordered that the bond for writ of error be fixed at the sum of $500.

13 *Petition for Writ of Error.*

In the United States C. C. for the Northern Dist. of Texas, at Dallas.

JAMES C. THOMPSON
vs.
GEO. W. BAKER *et al.* } 1080.

To the honorable judges of the circuit court of the United States for the northern district of Texas, at Dallas:

James C. Thompson, plaintiff in the above-entitled cause, comes now and prays your honors to allow him a writ of error to the Supreme Court of the United States and for the reversal of a judgment rendered in the above-entitled cause against petitioner herein and in favor of said defendants, Geo. W. Baker and H. B. Schuler, and *and* that your honors issue a citation commanding the said Geo. W. Baker and H. B. Schuler to appear and answer said writ of error in said Supreme Court on the second Monday in October, 1888, and that your honors fix the amount of and approve a bond to be given by your petitioner for the prosecution of his said writ of error; and as in duty bound he will ever pray.

CRAWFORD & CRAWFORD,
Att'ys for Petitioner.

Writ of error allowed by—
A. P. McCORMICK,
U. S. Dist. Judge.

(Endorsed:) 1080. Jas. C. Thompson *v.* G. W. Baker *et als.* Petition for writ of error. Filed Feb'y 17, 1888. A. J. Houston, clerk by Jas. D. Adams, deputy.

14 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the northern district of Texas, Greeting:

Because in the record and proceedings as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the northern district of Texas, before you, between James C. Thompson, plaintiff, and Geo. W. Baker and H. B. Schuler, defendants, a manifest error hath happened, to the great damage of the said James C. Thompson, as by the complaint appears, and it being fit that the error, if any there hath been, should be fully corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, to-

gether with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further
15 to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this the 17th day of February, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the 113th.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON,
Clerk U. S. Circuit Court, North. Dist. Texas, at Dallas.

Writ of error allowed.
A. P. McCORMICK,
U. S. Dist. Judge.

[Endorsed:] 1080. James C. Thompson *vs.* Geo. W. Baker *et al.* Writ of error. 2, 17, '88.

16 & 17 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

To Geo. W. Baker and H. B. Schuler, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Texas, at Dallas, wherein James C. Thompson is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment mentioned in the said writ of error mentioned should not be corrected and speedy justice done to the parties in this behalf.

Witness the Honorable A. P. McCormick, district judge of the United States for the said northern district of Texas, at the city of Dallas, in said district, this the 17th day of February, A. D. 1888.

A. P. McCORMICK,
U. S. Dist. Judge.

We accept service of the above citation this the 17th day of February, 1888.

ROBERTSON & [illegible]OKE,
Counsel for Def'ts in Error.

(Endorsed:) 1080. Jas. C. Thompson *v.* G. W. Baker *et al.* Citation in error. 2, 17, '88.

18 *Writ of Error Bond.*

In U. S. C. Court for the Northern District of Texas, at Dallas.

JAMES C. THOMPSON
vs. } 1080.
GEO. W. BAKER *et al.*

Know all men by these presents that we, James C. Thompson, as principal, and J. R. Barrett and C. Newkirk, as sureties, are held and firmly bound unto Geo. W. Baker and H. B. Schuler in the sum of five hundred dollars ($500.00), to be paid to the said Geo. W. Baker and H. B. Schuler, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and
19 each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this January 31st, 1888.

Whereas the above-named James C. Thompson has presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the suit of James C. Thompson *vs.* Geo. W. Baker and H. B. Schuler, in the circuit court of the United States for the northern district of Texas, at Dallas, on Jan'y —, 1888, by said judgment the plaintiff takes nothing by his suit and the defendant, H. B. Schuler, recovered of the said James C. Thompson the land in controversy and defendants recovered of said plaintiff, James C. Thompson, all costs of suit:

Now, the condition of this obligation is such that if the above-bound James C. Thompson shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

JAMES C. THOMPSON. [SEAL.]
J. R. BARRETT. [SEAL.]
C. NEWKIRK. [SEAL.]

Approved:

A. P. McCORMICK,
U. S. Dist. Judge.

STATE OF MISSOURI, } *ss:*
County of Pettis, }

We, the undersigned, James C. Thompson, J. R. Barrett,
20 and C. Newkirk, having been severally duly sworn, on our oaths do state that we are each of us, respectively, worth more than $500 over and above all liabilities and legal exemptions.

JAMES C. THOMPSON.
J. R. BARRETT.
C. NEWKIRK.

Subscribed and sworn to before me, a notary public in and for Pettis county, Missouri, this 14 day of February, 1888.

Witness my hand and seal.

[SEAL.] F. H. GUENTHER,
Notary Public.

(Endorsed:) 1080. James C. Thompson *vs.* Geo. W. Baker *et al.* Writ of error bond. Filed Feb'y 17, 1888. A. J. Houston, clerk, by Jas. D. Adams, deputy.

21 I, A. J. Houston, clerk of the United States circuit court for the northern district of Texas, at Dallas, do hereby certify that the foregoing is a full, true, and correct transcript of the petition, amend- answer, argument, and statement of facts, judgment of the court, motion for new trial, petition for writ of error, writ of error bond, and the original writ of error and citation in error in case No. 1080, and styled James C. Thompson *vs.* George W. Baker *et al.*, all of which appears from the records of this court.

Witness the seal of said court and the name of the clerk thereof, at Dallas, Texas, this 18th day of July, A. D. 1888, and — the Independence of the United States of America the 113th year.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

A. J. HOUSTON, *Clerk.*

Endorsed on cover: N. Texas C. C. U. S. No. 1053. James C. Thompson, plaintiff in error, *vs.* George W. Baker and H. B. Schuler. Filed August 9, 1888.

Office Supreme Court U. S.
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JAMES H. McKENNEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1891.

JAMES C. THOMPSON,
Plaintiff in Error,
vs.
GEORGE W. BAKER and H. B. SCHULER,
Defendants in Error.
} No. 72.

IN ERROR TO THE CIRCUIT COURT FOR THE NORTHERN DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFF IN ERROR.

D. A. McKNIGHT,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1891.

JAMES C. THOMPSON,
Plaintiff in Error,
vs.
GEORGE W. BAKER and H. B. SCHULER,
Defendants in Error.

No. 72.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This is a writ of error to the United States Circuit Court for the Northern District of Texas, at Dallas, the plaintiff in error being the plaintiff below (Record, fol. 13). The suit below was trespass to try title to land—in the nature of an action of ejectment—and the Record shows citizenship as the ground of jurisdiction. Thomp-

son being a citizen of Missouri, Schuler of Kansas, and Baker of Texas (f. 2). The real controversy is between Thompson and Schuler, Baker being the common source of their alleged titles (f. 5). The land in controversy is of the value of $8,000 (f. 8).

The petition, filed February 25, 1887, sets up seizure in fee and possession by plaintiff of certain land in Clay County, Texas, on August 5, 1886, and that on said day defendant Baker entered and ejected plaintiff, and unlawfully withholds the land from him, to his damage in the sum of $10,000 (ff. 2, 3); it also suggests a claim of possession and of "some kind of title" by defendant Schuler; and it prays for citation of both defendants, for judgment of restitution, damages, and costs, and for general relief (f. 4). Schuler alone defends, and in his amended answer pleads (1) the general issue, and (2) specially, "by way of reconvention," ownership in fee and right of possession on January 1, 1887; averring that on said date plaintiff wrongfully entered on the land and ejected him, and afterwards unlawfully withheld possession from him, to his damage in the sum of $5,000; and he prays for judgment for the land, damages, restitution, costs, etc. (ff. 4, 5.) No replication to the special plea was made.*

The parties waived a jury, and submitted an agreed statement of facts, dated December 29, 1887, which the court found as the facts in the case (ff. 5–8), and which

[*NOTE.—The action of trespass to try title in Texas is statutory (Rev. Stat. Tex., Art's. 4784–4812). It answers the same purpose as ejectment elsewhere (Hays *v.* T. & P. R'y Co., 62 Tex., 397). The petition is a proper one, but possession by the defendant is unnecessary on the above pleadings (Rains *v.* Wheeler, 76 Tex., 390; Thompson *v.* Locke, 66 Tex., 383), and the replication was not required (McDonald *v.* Tinnon, 20 Tex., 245).]

are substantially as follows—herein re-arranged so as to exhibit the successive steps by which either party acquired, or attempted to acquire, title to the land, namely :

1. How Baker endeavored to pass his title.
2. How Schuler endeavored to acquire a lien.
3. How Baker's vendee endeavored to pass his title.
4. How Thompson acquired an interest in the land.
5. How Schuler endeavored to acquire title.
6. How Thompson endeavored to acquire title.

On August 30, 1884, Baker, intending to defraud his creditors, made to his nephew, Looney Ledbetter, a deed of the land, with general warranty, reciting a consideration of $8,225, evidenced by three promissory notes, each for one-third of said sum, due respectively on September 1, 1885, September 1, 1886, and September 1, 1887. Before the deed was made, Ledbetter, a single man, lived with Baker on the land, and had forty head of cattle on it; after said date, Ledbetter continued to live with Baker as before, and as before kept his cattle on the land, Baker also having three hundred head of cattle on it. The deed reserved a vendor's lien, and was never delivered to Ledbetter, but was put on record by Baker on September 29, 1884.

On September 24, 1884, Schuler who was a bona-fide creditor of Baker long prior to the making of said deed, holding the note of Baker and others for $10,000, sued the makers of said note in the district court of Clay County, Tex., and on the same day a writ of attachment in said suit was levied on the land as the property of Baker. This writ of attachment has never been foreclosed. The suit was removed into the Circuit Court by Schuler on December 4, 1884. On December 5, 1884, Schuler sued out in the Circuit Court another writ of attachment, which was on the same day levied on the land as

the property of Baker. Ledbetter was not made a party of this suit.

On May 9, 1885, Ledbetter conveyed the land to one J. N. Israel by a general warranty deed, reciting a consideration of $10,000 in cash; on the same day Baker executed a release of his vendor's lien; on May, 11, 1885, Baker executed to Israel a quitclaim deed of the land; and on May 14, 1885, these instruments were recorded. No consideration was paid by Israel to Baker or Ledbetter for these conveyances.

On August 1, 1885, plaintiff Thompson advanced to Israel $5,000 on Israel's note, secured by mortgage on the land. On said date plaintiff made said loan on the faith of the mortgage, and he had no actual notice of the fraudulent intent of Baker in making deed to Ledbetter, or of the want of consideration or other infirmity therein, except such as the law imputed to him from the deeds themselves and from Schuler's attachments, or of any defect in the title. He knew nothing of the fact that Israel had paid no consideration for the conveyances aforesaid. Default having been made by Israel, plaintiff began suit in the court below to foreclose the mortgage, but defendant Schuler was not made a party.

Neither Israel nor plaintiff was made a party to Schuler's suit against Baker and others. On January 12, 1886, Schuler recovered judgment in said suit for the debt sued on, with foreclosure of the second attachment lien. The judgment recites that the attachment lien as it existed on December 5, 1884, is foreclosed, and it makes no mention of the writ of attachment issued in the State court. The land was sold under this judgment on June 1, 1886, Schuler became the purchaser, and the marshal's deed to him was recorded on June 4, 1886.

In Thompson's suit against Israel, decree of fore-

closure was entered on June 16, 1886, the land was sold on August 3, 1886, Thompson became the purchaser, and the marshal's deed to him was recorded in September 1886.

The said deeds, mortgage, and release, are recorded in Clay County, and all the suits and other proceedings were proper and regular.

The suit below was decided on January 17, 1888, and the court was of the opinion that the law arising upon said facts was in favor of the defendants. No written opinion was filed, as counsel is informed. The court also found Schuler, on his cross-action, to be the owner of the land, and gave judgment in his favor against Thompson for its recovery, and for the costs of the suit. To all of which judgment the plaintiff excepted (ff. 9–11). A motion for a new trial was overruled on January 23, 1888 (f. 12), and on February 17, 1888, this writ of error was sued out (f. 13).

BRIEF OF ARGUMENT.

This suit is between two purchasers at execution sales of the same land, each holding the marshal's deed, and the true ownership may properly be determined in an action of trespass to try title (Railway Co., *v.* Whitaker, 68 Tex., 630).

It is apparent, from the agreed statement of facts, that the points of difference between the alleged titles of the parties are these:

Thompson, the plaintiff, claims that Baker's deed passed his title prior to Schuler's attachment lien, and that he therefore has the elder title, which, on the pleadings, entitles him to judgment; that the deeds, from

Baker down to Israel, were untainted by fraud or other invalidity; and that, if they were tainted by invalidity, he nevertheless acquired a good title as an innocent purchaser for value.

Schuler, the defendant, claims (it is presumed) that he acquired a good lien on the land, because Baker's deed was not delivered, and because it was an executory contract merely, leaving the legal title in Baker at date of the attachment lien; and because Baker's deed was a fraudulent conveyance, which under the statutes of Texas is void.

The argument for the plaintiff is primarily founded on two propositions of law, fixing the scope and effect of an agreed statement of facts, namely, that in this Court, as in the court below, the agreed statement embodies "the ultimate facts or propositions which the evidence is intended to establish" (Burr *v.* Des Moines Co., 1 Wall. 99), and is held "to present questions of law alone for the consideration of the Court" (Supervisors *v.* Kennicott, 103 U. S., 554). Upon these "ultimate facts," in connection with the pleadings, it is submitted that the court below erred in its application of the law, and that judgment should have been rendered for the plaintiff.

FIRST.

THE CONCLUSION OF LAW SHOULD HAVE BEEN THAT THE PLAINTIFF'S TITLE IS SUPERIOR BECAUSE THE FACTS SHOW IT TO BE THE OLDER, AND ON THE PLEADINGS THE DEFENDANT COULD NOT ATTACK ITS VALIDITY.

1. *Baker's deed, being recorded prior to Schuler's attachment lien, vested a prima-facie elder title in the plaintiff.*

Both parties deraign from Baker as a common source

of title. But the plaintiff starts with Baker's deed to Ledbetter, dated August 30, 1884, and recorded September 29, 1884; whilst the defendant starts with the marshal's deed, recorded June 4, 1886, under a sale made June 1, 1886, upon the foreclosure of an attachment levied December 5, 1884. An attachment lien becomes effective at date of the levy (Rev. Stat. Tex., Art. 179).

Art. 179. The execution of the writ of attachment upon any property of the defendant subject thereto, unless the writ shall be quashed or otherwise vacated, shall constitute a lien from the date of such levy on the real estate levied on.

But it is to be observed that the defendant is not now in court for the purpose of enforcing either or both of the attachment liens which he placed on the land, but as a stranger to that suit, and a mere purchaser under the lien actually foreclosed. The lien of the attachment levied on September 24, 1884, on the writ from the State court, was never foreclosed as required by the statute (Rev. Stat. Tex., Art. 180).

Art. 180. Should the plaintiff recover in the suit, such attachment lien shall be foreclosed as in case of other liens, and the court shall direct . . . the sale . . . of the real estate levied on to satisfy the judgment.

Hence the lien acquired prior to the recording of Baker's deed was abandoned, and at the execution sale the defendant took nothing under it (Cook *v.* Love, 33 Tex., 487). He bought only the execution debtor's interest at date of the levy of December 5, 1884 (Jones *v.* Powers, 65 Tex., 207; Sullivan *v.* O'Neal, 66 Tex., 433), and at said date prima-facie the title was not in Baker.

Indeed, the statutes of Texas expressly provide that deeds "shall take effect and be valid . . . as to all credit-

ors " from the time they are filed for record (Rev. Stat., Tex., Art. 4334).

Art. 4334. Every conveyance, covenant, agreement, deed, deed of trust, or mortgage, in this chapter mentioned, which shall be acknowledged, proved, or certified according to law, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors, from the time when such instrument shall be so acknowledged, proved or certified, and delivered to such clerk to be recorded, and from that time only.

Upon this statute the Supreme Court of Texas has ruled as follows: "The creditor cannot object to the sale of his property by the debtor before his lien has attached to it. Such sale, if the title is registered, is conclusive upon the creditor" (Ayres *v.* Duprey, 27 Tex., 593, 607). It is obvious therefore that the plaintiff has proved the older title of record, and that his title is prima-facie valid.

2. *In an action of trespass to try title, the prima-facie elder title prevails.*

The action of trespass to try title is in principle like an action of ejectment (Rev. Stat. Tex., Art. 4785).

Art. 4785. The trial shall be conducted according to the rules of pleading, practice and evidence in other cases in the district court, and conformably to the principles of an action of ejectment, except as herein expressly provided.

In an action of ejectment, proof of a common source of title, with conveyances linking it to the plaintiff, makes out his prima-facie case (Roosevelt *v.* Hungate, 110 Ill., 595; Smith *v.* Lindsey, 89 Mo., 76). Such is the law in Texas in the action of trespass to try title, the prima-facie paper title being sufficient (Montgom-

ery *v.* Carlton, 56 Tex., 361). Proof of an elder deed entitles the plaintiff to recover (Sellman *v.* Hardin, 58 Tex., 36), and proof of a title originating prior to the attachment lien is sufficient (Sebastian *v.* Martin Brown Co., 75 Tex., 291). Where there was a plea of the general issue, and also a special plea in reconvention, with allegation of title, as in the case at bar, the court held the plaintiff entitled to a finding in the absence of proof of a superior right in the defendant (McNamara *v.* Meunch, 66 Tex., 68).

Plaintiff Thompson, then, having proved an older paper title, is entitled to judgment, unless there be some other principle of law arising upon the facts which bars it. To ascertain whether there is such a bar, we will examine each one of the recited facts bearing on the question.

3. *The priority of the marshal's deed to the defendant does not, under the statutes of Texas, impair the plaintiff's title.*

Schuler's deed from the marshal was made in June, 1886, and Thompson's deed in September, 1886; and the foreclosure sale under Schuler's lien was earlier than the foreclosure sale under Thompson's mortgage. But, under the statutes of Texas (Rev. Stat., Art. 555), neither the judicial sale, nor the marshal's deed, has any effect on the right, title, or interest of third persons; and consequently the fact that the execution sale and deed to defendant were earlier than those to the plaintiff does not impair the plaintiff's title.

Art. 555. Every conveyance of real estate by a commissioner, sheriff, or other officer legally authorized to sell, under or by virtue of a decree of any court within this State, shall be good and effectual to pass the absolute title to such real estate to the purchaser there-

of; but nothing herein shall be construed to affect the title, right, or interest of any person or persons other than the parties to such conveyance, decree, or judgment, and those claiming under them.

4. *The pendency of the defendant's attachment suit, when the plaintiff acquired his interest, does not impair the title of the plaintiff, because he was not a party to the suit.*

The statutes of Texas do not provide for recording notice of suits, or of writs of attachment, and there was nothing of that kind in this case.

Lis pendens is not operative against the plaintiff, for the reason that neither he nor Israel was made a party to Schuler's attachment suit. In a suit at law, the lien of an attachment is analogous to *lis pendens* in chancery in its effect on property (Bennett, Lis Pendens, Sec. 267). "To affect a purchaser, who comes in *pendente lite* under the holder of the legal title, with constructive notice of the equity claimed against it, such holder of the legal title must have been impleaded at the time of purchase" (Id., Sec. 97).

In Texas, a purchaser from a party to a suit after levy of the attachment takes subject thereto (Tuttle *v.* Turner, 28 Tex., 759; Hancock *v.* Henderson, 45 Tex., 479; Paxton *v.* Meyer, 67 Tex., 96), and this is the general rule (Drake, Attach., Sec. 224, 239). The true and the modern doctrine of *lis pendens* is not that suit is notice, but that the law will not allow parties litigant to defeat the execution of the decree by a sale of the property (Dovey's Appeal, 97 Pa. St., 153). A purchaser is chargeable with *lis pendens* when the suit is against his grantor (Randall *v.* Snyder, 64 Tex., 350; Tredway *v.* McDonald, 51 Ia., 663), but there is no *lis pendens* when the holder of the legal title is not a party (Miller *v.*

Sherry, 2 Wall., 237; Union T. Co. *v.* Southern L. Co., 130 U. S., 565).

A bill to set aside a conveyance for fraud is not *lis pendens* as to the mortgagee, where the title was of record, and a purchaser of the mortgage title is not affected by it (Bradley *v.* Luce, 99 Ill., 234); and a suit to recover land is not notice to the mortgagee of the defendant before he is made a party to it (Arnold *v.* Smith, 80 Ind., 417).

The subject has recently been carefully examined by the Supreme Court of Kansas (Travis *v.* Supply Co., 42 Kas., 625), and they hold that an attachment levy on real estate is constructive notice only to such persons as may acquire subsequent interests in the attached realty from parties to the suit. They also cite a long list of cases which they had examined, and they say: "We have found no case that goes to the extent of saying that when A. sues B., and causes an attachment in that action to be levied upon the property of C., a subsequent purchaser from C., without actual knowledge, is bound by the attachment lien, or that the attachment levy is constructive notice to purchasers from C." And they held that the record of the prior deed of the execution debtor, in that case, was security for the subsequent purchaser from his grantee, whose title appeared to be good.

In the case at bar, it is found by the court below that Baker's deed was on record prior to the attachment lien, and that the plaintiff had no actual notice of any infirmity in the title at date of the loan and mortgage. [There is no finding as to his actual notice of such infirmity after said date, or as to his actual notice of Schuler's suit against Baker, or as to his actual notice of either of the attachment levies under that suit.] It is therefore a necessary conclusion of law that the plaintiff

was not affected by *lis pendens* under the attachment lien, and that he was an innocent purchaser for value.

5. *The reservation of a vendor's lien in Baker's deed does not impair the plaintiff's title, because it was not attachable; it was released of record when the plaintiff acquired his interest; and it is not shown that the purchase-money remains unpaid.*

In his deed to Ledbetter, Baker expressly reserved a vendor's lien. Under the decisions in Texas, the deed thereupon became an "executory contract," leaving the "superior title" in Baker. It is upon this construction of such a deed that the defendant presumably relies to support the contention that the legal title was in Baker when his attachment lien took effect.

It is useless to discuss the Texas decisions in general on the subject of an express vendor's lien, because they are conflicting, and they rarely discuss the question from the standpoint of principle. In attempting to distinguish between an implied and an express vendor's lien, they have formerly sometimes forced their doctrine of "excutory contract" to such extreme lengths, that in later years they are compelled to say that they regret it and disapprove it, and they are now engaged in the necessary duty of restraining it (Burgess *v.* Mellican, 50 Tex., 397; Cassady *v.* Frankland, 55 Tex., 457, 460; Summerhill *v.* Hanna, 72 Tex, 224; Stitzle *v.* Evans, 74 Tex., 596, 598; Huffman *v.* Mulkey, 78 Tex., 556, 560). Perhaps the best discussion of the question on principle, as well as authority, is that found in King *v.* Young Men's Association, 1 Woods, 386.

The broad ruling, that the contract is executory cannot avail the defendant here, for the reason that it is essentially restrained by several other well-settled rules of law.

(*a.*) The defendant, by his attachment suit, acquired no lien on the vendor's lien remaining in Baker

In Texas a vendor's lien is not assignable (Cassady *v.* Frankland, 55 Tex., 457, 460), it cannot be taken in execution (Vickery *v.* Ward, 2 Tex., 216), and it cannot be attached (Adoue *v.* Jemison, 65 Tex., 680). An express vendor's lien is the equivalent of a mortgage from the vendee to the vendor (Caldwell *v.* Frain, 32 Tex., 310; Baker *v.* Ramey, 27 Tex., 52; King *v.* Young Men's Ass'n, 1 Woods, 386), and the general rule is that such an interest is not attachable (Drake on Attachment, 235).

(*b.*) Baker had released his lien, and the release was of record, when the plaintiff acquired his interest.

The court below finds that Baker released his lien on May 9, 1885, the date on which Ledbetter conveyed to Israel. The release was recorded on May 14, 1885, and on August 1, 1885, Israel mortgaged the land to the plaintiff.

As the defendant could acquire no right to the vendor's lien by his attachment, very clearly his attachment could not prevent the release or waiver of the lien by the vendor.

Whether Baker's release was made to Ledbetter or to Israel is not stated; whether Ledbetter had paid Baker the amount due by his notes, or what the consideration was, is not stated; it is only stated that Israel did not pay Baker any consideration for it, but of this the plaintiff knew nothing. It is obvious that it cannot be conclusively determined from the agreed facts that this deed of release was without consideration. By the statutes of Texas it imported a consideration (Rev. Stat. Tex., Art. 4488).

Art. 4488. Every contract in writing hereafter made shall be held to import a consideration in the same man-

ner and as fully as sealed instruments have heretofore done.

As the lien was reserved for the purpose of securing the payment of Ledbetter's notes, as there is no finding that the release was made with a fraudulent intent, as a court will always presume a transaction to be fair and regular until the contrary is shown, it is submitted that the only just inference here is that the release was made because the purchase-money had been paid. In Texas the lien is a security for the debt evidenced by the notes, and lasts as long as the debt can be enforced, unless it be waived or abandoned (Flanagan *v.* Cushman, 48 Tex., 241; Moore *v.* Giesecka, 76 Tex., 543, 550; Slaughter *v.* Owens, 60 Tex., 668). If waived or released, the law will not presume that it afterward exists (Brown *v.* Christie, 35 Tex., 689; Malone *v.* Kauffman, 38 Tex., 454). When the plaintiff made his loan and purchased the land, he had notice by the registry of deeds that the lien had been released, and it is expressly admitted that he had no notice of any infirmity in the title; wherefrom it must follow that he was justified in presuming that the lien was released because the purchase-money had been paid. He purchased free of the lien because the records showed that it had been waived (De Cordova *v.* Hood, 17 Wall., 1; Brick *v.* Buel, 73 Tex., 511). A conveyance reserving a lien is good in trespass to try title, where it appears that the purchase-money was paid (Land Co. *v.* Wood, 71 Tex., 460), and it must be equally good when the vendor's lien is released.

(*c.*) To avail himself of the vendor's lien in this suit, the defendant must have proved that the purchase-money was not paid to Baker, which he has not done.

The statement of facts shows three notes given to

Baker as the consideration for his deed, but it does not show that these notes were not paid. Under Texas decisions, "the existence of a debt is necessary to support a lien" (Hodges *v.* Roberts, 74 Tex., 517, 519), and consequently, to have the benefit of the lien, the defendant should have proved that the notes remained unpaid.

Again, the vendee may sell or encumber the land, subject only to the vendor's rights (Tom *v.* Wollhoeffer, 61 Tex., 277): and hence the necessity of the ~~plaintiff's~~ defendant's showing that Baker's rights as vendor still subsisted because of the non-payment of the purchase-money.

Again, the defendant attached, and afterward bought, only the interest which Baker had at date of the levy (Drake, Attach., 245, 234; Osterman *v.* Baldwin, 6 Wall., 116; Rev. Stat. Tex., Art. 2316: cases *supra*), and that was a mere right to rescind and foreclose the lien or recover the land on default of payment (Naas *v.* Chadwick, 70 Tex., 157; Gunst *v.* Pelham, 74 Tex., 586), his vendee's title being defeasible by failure to pay alone (Land Co. *v.* Wood, 71 Tex., 460; Stitzle *v.* Evans, 74 Tex., 596, 598). There is no case to be found in the Texas Reports which holds that the vendor can rescind and recover the land until there has been a default in the payment of the purchase money. Wherefore the necessity of the defendant's showing such a default in the case at bar.

This particular question has very recently been under review by the Supreme Court of Texas (Huffman *v.* Mulkey, 78 Tex., 555), and may be regarded as finally settled. The Court therein hold that the vendor's right to rescind "is not an absolute right, even in cases in which the purchase-money has become due and remains unpaid:" that before the vendor "could hold the land by any superior right as a vendor, it would be incumbent on him to show a right to rescind, which, in substance,

could not be proved unless it was shown that the purchase-money was due and unpaid :" that "one to whom a vendee has conveyed is entitled to all the rights of his vendor :" and that "the right to rescind does not exist until the vendee is in default, and to prove the fact giving this right rests on the vendor in a contest with a third person." *A fortiori* the defendant, who claims under an execution sale after the release of the original vendor's lien, must have proved the default in this case, and that he has failed to do.

6. *The defendant is estopped by his pleadings from attacking the validity of Baker's deed, under which the plaintiff claims title.*

Under the statement of facts, the deed is subject to attack for two causes: first, because it was not delivered: and, second, because it was made to defraud Baker's creditors. It has already been shown that upon recording the deed became valid against all creditors, and it is submitted that on the pleadings in this case that prima-facie validity cannot be attacked.

The statutes governing an action of trespass to try title are as follows: "The trial shall be conducted . . . conformably to the principles of trial by ejectment" (Rev. Stat. Tex., Art. 4785, *supra*). "The defendant in such answer may file only the plea of not guilty" (Id., Art. 4792). "Under such plea of not guilty, the defendant may give in evidence any lawful defense to the action, except the defense of limitation, which shall be specially pleaded" (Id., Art. 4793). These statutes govern the pleadings and evidence so far as they apply to the case at bar, and in other particulars they are governed by the general principles of law.

Now the defendant set out two pleas in his answer, namely, the general issue, and a special plea alleging

a possessory right and fee simple title in himself. Under the plea of "not guilty" he might have shown any matter of defense except the statute of limitations (Dalby *v.* Booth, 16 Tex., 563); he might have proved a superior title in himself or the nullity of the plaintiff's title (Stephens *v.* Hix, 38 Tex., 656), and he might have shown fraud in the plaintiff's title (McKamey *v.* Thorp, 61 Tex., 648). Such evidence would be conformable to the principles of trial in the action of ejectment (Adams, Eject., 270; Tyler's Stephen, Plead., 3d Am. Ed., 174). In ejectment he might also plead specially (Ibid.), and he might have specially pleaded fraud or other invalidity in this case (McKamey *v.* Thorp, *supra*), when he would have been at liberty to adduce evidence of it. But he did not choose to do so. He contented himself with pleading that he was the owner in fee and entitled to possession on January 1, 1887.

The judgment below refers to this plea as a "cross-action," but it obviously is not so strictly, though it may be in the nature of a cross-action. It is essentially a plea, called a "plea in reconvention," which, under the practice in Texas in trespass to try title, entitles the defendant to pray judgment for the land (Egery *v.* Power, 5 Tex., 501). The suit below was a mixed action, in which the plaintiff set out a fee simple title and possession, his prayer being for the recovery of the land under that title and for damages; and it was, therefore, the right of the defendant not only to traverse generally, but to specially plead title in himself. This he has done.

Now, when the defendant pleads specially he waives the plea of "not guilty," which thereupon only requires that the plaintiff shall make out his own case, and is held strictly to his special defense (Shields *v.* Hunt, 5 Tex., 424; Custard *v.* Musgrove, 47 Tex., 217; Rail-

way Co. *v.* Whitaker, 68 Tex., 630). In the last two cases cited the ruling was made in regard to a "plea in reconvention," averring title in the defendant. The reason of the rule is that the defendant has tendered a special defense and that the plaintiff has the right to rely on that as his only defense; and it is particularly applicable to a case like that at bar, where the plaintiff was a bona fide purchaser for value, without any actual or constructive notice of an infirm title, or of the defendant's attachment suit. In none of the cases just cited did the question of the defendant's right to show invalidity of title under his plea arise, but it is conceived that the principle settled disposes of it, especially on a comparison of these cases with others above cited, where it was held that such invalidity may be specially pleaded or proved under the general issue. The question has arisen in a case in the Circuit Court of the United States, where it was held that the rule was not applicable, but solely because the plea was limitation, which the statute itself requires to be pleaded specially (Sheirburn *v.* Hunter, 3 Woods, 281).

The plaintiff alleged seizin in fee on August 5, 1886, and the defendant replied seizin in fee on January 1, 1887. A plea admits all the allegations of the complaint which it does not traverse, and therefore this plea admits the plaintiff's seizin in fee on August 5, 1886. It is submitted that the defendant should be strictly held to proof of his seizin at the later date alleged in his plea, for, as his title might possibly have begun on that date (Tyler's Stephen, Plead., 291), the plaintiff was not apprised that he intended to prove an earlier title. It is conceived that on a case stated, the court is precluded from considering facts which depart from the pleadings: for a case stated is no more than counsel's admission of what can be proved, and not of

what is the issue, or of what is legal evidence under it. These are matters for the court. Hence, as plaintiff has proved his seizin in fee on August 5, 1886, his title is the elder, and the judgment should be for him on defendant's plea of seizin in fee at a later date. A plea in reconvention must aver a good cause of action against the plaintiff (Rose *v.* Railroad Co., 31 Tex., 49).

If, however, the admission in the case stated of a common source of title is controlling in this action, then, as the defendant has waived proof of the invalidity of the plaintiff's title under the general issue, and has not apprised plaintiff in his special plea of his intention to prove it, which he should have done when he alleged his own title at a later date, the court below should have disregarded the facts tending to show fraud or other invalidity, and have given judgment for plaintiff on the older paper title from Baker which the agreed statement establishes.

If on the state of the pleadings the defendant may be heard to attack the validity of the plaintiff's title, then it becomes necessary to examine the evidence bearing on this point, which appears to be confined to fraud and the non-delivery of Baker's deed.

SECOND.

THE CONCLUSION OF LAW SHOULD HAVE BEEN THAT THE PLAINTIFF'S TITLE WAS NOT AFFECTED BY THE NON-DELIVERY OF BAKER'S DEED MENTIONED IN THE AGREED STATEMENT OF FACT.

The agreed statement recites that "said deed was never delivered to Ledbetter." This is a fact put in evidence, and it therefore means that there was no manual delivery, or delivery in fact. Where the de-

fendant expressly denied delivery, it was held to mean merely "that no formal or ceremonious act of delivery took place" (Farrer *v.* Bridges, 5 Humph., Tenn., 411). Whether there was a delivery in law is a question for the court.

To pass title in Texas, as elsewhere, the deed must be delivered (Rev. Stat. Tex., Art. 548), but the delivery may be either actual or constructive, and a constructive delivery may be shown in the usual manner (Tuttle *v.* Turner, 28 Tex., 759).

1. *There is no "ultimate fact" in the record which tends to show that there was not a good constructive delivery of Baker's deed.*

It is recited that before and after the deed was made "Ledbetter lived with Baker on the land," and that they both kept cattle there: but this obviously falls far short of a finding that there was no change of possession, from which an intention not to deliver might be inferred. If it was intended to allege that Baker's possession after the execution of the deed was adverse to his grantee, the agreed statement should have been explicit: for Baker's continuing to live and keep cattle on the land is mere evidence upon the question of change of possession, and with that the court cannot deal (Burr *v.* Des Moines Co., *supra*). There is therefore no finding of fact in regard to the legal possession, and in such a case the presumption of law is that the possession is with the title (Cameron *v.* Romele, 53 Tex., 238, 244; Bliss *v.* Smith, 1 Ala., 273; Miller *v.* Fraley, 23 Ark., 735, 746). It is inferable from the sale of land that the vendee was in possession (Mallory *v.* Stodder, 6 Ala., 80). Upon a sale the ownership passes to the vendee, and the presumption of law is that the occupation of land is in subordination to the rights

of the true owner, the burden being on the occupant claiming to hold adversely to show the character of his possession (Alexander *v.* Polk, 39 Miss., 737). And finally, in ejectment a man cannot object his own possession against his own deed (Duval *v.* Bibb, 3 Call, Va., 313, 362), and of course one claiming through him cannot do so.

2. *On the other hand, there are several facts from which the necessary conclusion is that there was a good constructive delivery of the deed prior to the attachment lien of December* 5, 1884, *under which the defendant claims.*

Ledbetter's notes are in evidence, that is, the court below found that the consideration for the sale was his three notes for $8,225, which was a valuable consideration (Weaver *v.* Nugent, 72 Tex., 272). Ledbetter, then, being a purchaser for value and entitled to a deed, and being the beneficiary under the deed, and there being no finding of fact as to his acceptance of the deed, his acceptance of it will be presumed (Lady Superior *v.* McNamara, 3 Barb. Ch., 375; Moore *v.* Giles, 49 Conn., 570). "The presumption of law is, in the absence of evidence to the contrary, that the grantee accepted the deed" (Tompkins *v.* Wheeler, 16 Pet., 106, 118). On September 29, 1884, and prior to the attachment lien, the deed was recorded by Baker. There is no finding of fact as to his intent in recording it, but it was done deliberately, for the statute (Rev. Stat. Tex., Art. 554) required certain formalities prior to record; and, as it was against his own interest, and a cloud on his title, the reasonable presumption of law is that it was recorded for the purpose of passing title to Ledbetter—whether to hold it himself or to transfer it to Israel is immaterial. This presumption is strengthened by the

admitted fact that Baker made the deed for the purpose of defrauding his creditors; for to accomplish that purpose it was necessary to pass title out of himself, and the deed was void as to creditors unless filed for record (Id., Art. 4332), and valid as to creditors when filed for record (Id., Art. 4334, *supra*). The very fact that there was no manual delivery of a deed that was intended to defraud creditors is proof of Baker's belief that recording it was a sufficient delivery. His subsequent quitclaim to Israel, after Ledbetter's conveyance to Israel, is proof that he regarded the deed as already delivered and the title in Ledbetter. From all these facts, it is submitted, it is a conclusive presumption of law that Baker recorded the deed with the intent of passing title to Ledbetter. There is no finding of fact in regard to Ledbetter's connection with the recording, and in such a case the assent of the grantee is presumed (Hammell *v.* Hammell, 19 Ohio, 17). He manifestly assented to the recording and accepted the deed afterward when he executed the conveyance to Israel.

Now, the law is that the registration of a deed by the grantor for the use of the grantee is a complete delivery (2 Greenl. Ev., Sec. 297; Linton *v.* Brown, 20 Fed. Rep., 455). It was so held in a case where the grantor had retained the custody of the deed for a month, recorded it through fear of an impending attachment, and afterward retained possession of the land (Moore *v.* Giles, 49 Conn., 570). If the grantor record a deed for the purpose of enabling the grantee to convey, it is a good delivery, though he remained in possession (Jackson *v.* Cleveland, 15 Mich., 94, 101). Registration by the grantor is equivalent to delivery if he subsequently recognizes the title of the grantee under it (Corley *v.* Corley, 2 Cold., Tenn., 520). A sub-

sequent acceptance by the grantee relates back to the date of the delivery for record (Lady Superior *v.* McNamara, 3 Barb. Ch., 375; 4 Kent. Com., 454). This Court has held, in a suit to set aside the deed of an insolvent debtor, that the delivery to the clerk for recording may well be considered as falling within the rule laid down in Sheppard's Touchstone, 58, "that if a deed be delivered to a stranger for the use of the grantee, without any condition annexed making it an escrow, it is a delivery to the grantee" (Tompkins *v.* Wheeler, 16 Pet., 106, 119).

Two cases in this Court (Young *v.* Gilbeau, 3 Wall., 641; Parmalee *v.* Simpson, 5 Wall., 581), which hold that recording a deed without delivery does not prevent the lien of an attachment, do not conflict with the foregoing rule: for in these, as in many similar decisions in the books, it was proved that the deed was made without the knowledge and assent of the grantee, which has not been done in the case at bar.

3. *If, however, the deed was not constructively delivered by recording it, nevertheless Baker had sold the land and Ledbetter was its real owner, and it was therefore not subject to Schuler's attachment.*

The agreed statement recites that "on Aug. 30, 1884, Baker made a deed . . . to Looney Ledbetter, reciting a consideration of 8,225 dollars, evidenced by three promissory notes . . . due respectively Sept. 1, 1885, Sept. 1, 1886, & Sept. 1, 1887." There is no statement of the terms of these notes, but it is presumable that they were one, two, and three years' notes, falling due at the expiration of the three days' grace recognized by statute (Rev. Stat. Tex., Art. 276; Act of January 11, 1862), and therefore that they were made on August 29, 1884, or prior to the making of the deed. It is

agreed that these notes were the consideration for the deed, and since the consideration passed prior to making it, Ledbetter was the owner for all practical purposes, whether he had a deed or not (Roberts *v.* Smith, 21 S. C., 455), and the transaction was equivalent to an agreement to convey, which equity would enforce (Martin *v.* Colby, 49 Hun., N. Y., 1).

If, however, the consideration passed at or after the making of the deed, nevertheless, though invalid for want of delivery, the deed was a good contract for a conveyance from its date under the statute (Rev. Stat. Tex., Art. 561), which provides: "When an instrument in writing, which was intended as a conveyance of real estate, or some interest therein, shall fail either in whole or in part to take effect as a conveyance by virtue of the provisions of this chapter," (one of which is delivery; Art. 548), "the same shall nevertheless be valid and effectual as a contract upon which a conveyance may be enforced, as far as the rules of law will permit." An undelivered deed is evidence of a sale, and will be enforced in equity (Nay *v.* Mograin, 24 Kas., 75; Jenkins *v.* Harrison, 66 Ala., 345).

An equitable title may be set up in an action of trespass to try title (Thompson *v.* Locke, 66 Tex., 383; Robertson *v.* Du Bose, 76 Tex., 1).

Since a conveyance by Baker could have been enforced, he had lost his power over the land, and it was not subject to attachment by his creditors (Black *v.* Zacharie, 3 How., 483; Drake, Attach., Sec. 245; 1 Smith's Lead. Cas., 9th Am. Ed., 34). The title remaining in Baker was a barren legal title, which could not be sold for the payment of his debts (Smith *v.* McCann, 24 How., 398; Osterman *v.* Baldwin, 6 Wall., 116; Withnall *v.* Courtland Wagon Co., 25 Fed. Rep., 372). The defendant, who appears here as a purchaser at the mar-

shal's sale, took subject to all outstanding equities (Ibid.), is presumed to have had notice of all defects of the execution debtor's title (Richardson *v.* Wicker, 74 N. C., 278), and, because of the registration of the deed, was not an innocent purchaser (Vaughan *v.* Greer, 38 Tex., 350; Crews *v.* Burcham, 1 Black, 352). A debtor may sell to whom he pleases, if there be no lien (King *v.* Russell, 40 Tex., 124), and if a sale be made prior to the attachment lien the creditor takes nothing (Paxton *v.* Meyer, 67 Tex., 96; Barnett *v.* Vincent, 69 Tex., 685).

Whether, therefore, there was or was not a constructive delivery of Baker's deed, it is submitted that the plaintiff's title was not affected by the failure of delivery mentioned in the agreed statement of facts.

THIRD.

THE CONCLUSION OF LAW ON THE "ULTIMATE FACTS" RECITED, SHOULD HAVE BEEN THAT BAKER'S DEEDS TO LEDBETTER AND ISRAEL WERE NOT FRAUDULENT CONVEYANCES.

It is not stated in the finding below that Baker's deeds were fraudulent conveyances, which the statute avoids as against creditors; but certain facts are recited, upon which the court was asked to find the conveyances fraudulent as a conclusion of law.

1. *The express references to fraud relate to Baker's intent alone, and only to the first deed.*

"On August 30, 1884, Baker made a deed . . . to Looney Ledbetter. This deed was made to defraud creditors. Plaintiff . . . had no notice of the fraudulent intent of Baker in making deed to Ledbetter." There

is no finding that Ledbetter participated in Baker's fraudulent intent or that he had any knowledge of it. Under the Statute of Elizabeth, a purchaser is not affected by his vendor's intent to defraud (Astor *v.* Wells., 4 Wheat., 466; Prewit *v.* Wilson, 103 U. S., 22; Jones *v* Simpson, 116 U. S., 609). Notice of such intent is required by the Texas statute against fraudulent conveyances (Rev. Stat. Tex., Art. 2465), which provides: "This article shall not affect the title of any purchaser for a valuable consideration unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor." Ledbetter was a purchaser for a valuable consideration, but there is no finding that he was a party to the fraud, or had knowledge or notice of it. In the absence of proof of such knowledge, the vendee is protected by the statute (Collins *v.* Cook, 40 Tex., 338).

2. *The plaintiff was not required to show Ledbetter's good faith, for that is presumed until the contrary is shown.*

The claimant of attached property is not required to prove his good faith (Stephens *v.* Oppenheimer, 45 Ark., 492), because that is presumed (Quick *v.* Wolfe, 4 Mackey, D. C., 188; Long *v.* West, 31 Kas., 298), and alleged fraud must therefore be proved (Weisiger *v.* Chisholm, 28 Tex., 780; Chandler *v.* Von Roeder, 24 How., 224; Horback *v.* Hill, 112 U. S., 144), the burden of proof being on the creditor attacking the conveyance (King *v.* Russell, 40 Tex., 124; Miller *v.* Sherry, 2 Wall., 237; Deering *v.* Collins, 38 Mo. App., 73; Wolf *v.* Chandler, 58 Ia., 569; Chaffee *v.* Lisso, 34 La. An., 310), and, in an action of ejectment, on the purchaser at

sheriff's sale (Pennington *v.* Flock, 93 Ind., 378). The evidence must be clear and convincing (1 Smith's Lead. Cas., 9th Am. Ed., 36; Fifield *v.* Gaston, 12 Ia., 218; Clark *v.* Krause, 2 Mackey, D. C., 559), for doubt is resolved in favor of the conveyance (Webb *v.* Darby, 94 Mo., 621). These being the rules of evidence, it is manifest that there are not sufficient facts in the record to convince even a jury of Ledbetter's participation in the fraud, much less to warrant a court in finding it as a conclusion of law.

3. *The insolvency of Baker, even if known to Ledbetter, does not tend to prove the latter's share in the fraud.*

Baker's insolvency is not alleged or admitted. It can not be conclusively inferred from the attachment suit, for there are other grounds of attachment (Rev. Stat. Tex., Art. 152). If it could be so inferred, nevertheless it is admitted that Ledbetter was not a party to the suit, and it is not stated that he had any knowledge of it. Knowledge of the vendor's fraud is not to be presumed from knowledge of his insolvency (Cannon *v.* Young, 89 N. C., 264), and mere knowledge of insolvency does not avoid the deed, where an adequate price is paid (Trader's National Bank *v.* Clare, 76 Tex., 47). Ledbetter gave notes to the amount of eight thousand two hundred and twenty-five dollars for the land, which was an adequate price, for in the agreed statement its value is fixed at eight thousand dollars; and it was not incumbent on the plaintiff to prove payment of the purchase-money (Martel *v.* Somers, 26 Tex., 551).

4. *The relationship between Baker and Ledbetter is not proof of a fraudulent co-operation between them.*

Ledbetter was Baker's nephew, but no presumption of fraud arises from relationship (Moog *v.* Farley, 79

Ala., 246; Renney *v.* Williams, 89 Mo., 139). It is not a badge of fraud, but a fact of circumstance to go to the jury (King *v.* Russell, 40 Tex., 124; Means *v.* Montgomery, 23 Fed. Rep., 421; Schroeder *v.* Walsh, 120 Ill., 403; Spicer *v.* Spicer, 54 N. Y. Super., 280; Robinson *v.* Frankel, 85 Tenn., 475; Lininger *v.* Herron, 18 Neb., 450; Renney *v.* Williams, *supra*).

5. *Baker's continued residence on the land is not evidence of fraud, and therefore was not notice of fraud to Ledbetter.*

As above shown, it is not found in the agreed statement that Baker retained adverse possession of the land; but even if he did, it is of no legal significance (2 Bigelow: Fraud, Chap. 13, Sec. 5). No presumption of fraud arises from the grantor's retention of the possession of real estate (Pennington *v.* Flock, 93 Ind., 378; Clark *v.* Krause, 2 Mackey, D. C., 559). Taking rents and otherwise exercising control over it may be prima-facie evidence of fraud (Hancock *v.* Horan, 15 Tex., 507), but nothing of this kind appears in the record of the case at bar.

Indeed, such facts as insolvency, relationship and possession are properly facts for a jury (2 Bigelow, Fraud, Chap. 17; Vanhook *v.* Walton, 28 Tex., 72; Weisiger *v.* Chisholm, Id., 780; and cases *supra*). It is submitted that they are not the "ultimate facts," in an agreed statement, from which Ledbetter's participation in Baker's fraud can be found as a conclusion of law.

6. *The agreed statement does not show that Ledbetter had any means of knowledge of Baker's fraudulent intent.*

In regard to Ledbetter's notice of Baker's fraudulent intent, as contemplated by the statute, it must appear

that he had means of knowledge (Taylor *v.* Townsend, 61 Tex., 144), or knew such facts as would put a prudent man upon inquiry (Greenlove *v.* Blum, 59 Tex., 124; Blum *v.* Simpson, 66 Tex., 84; 71 Tex., 528). There is no admission of actual notice, or of any such means of knowledge, in the agreed statement of fact. The courts "do not possess the power of finding one material fact that is not admitted by inference from those that are admitted" (Baldwin *v.* Peet, 22 Tex., 714). The only facts here are the relationship of vendor and vendee, and the latter's continuing to live with the former on the land; but clearly these are not enough to raise a presumption of fraudulent notice. A court will not presume fraud from facts which are consistent with honesty (1 Smith's Lead. Cas., 9th Am. Ed., 114; Kane *v.* Drake, 27 Ind., 29; Strauss *v.* Abrahams, 32 Fed. Rep., 310; Deering *v.* Collins, 38 Mo. App., 73). Nay, even a strong suspicion of such notice is not sufficient to warrant it as an inference of law (Story, J., in Flag *v.* Mass, 2 Sum., 486, 551, quoting Lord Hardwicke; Miller *v.* Fraley, 23 Ark., 735, 746; Foust *v.* Moorman, 2 Ind., 17). "When a person has not actual notice, he ought not to be treated as if he had notice unless the circumstances are sufficient to enable the court to say, not only that he might have acquired it, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question" (Wilson *v.* Wall, 6 Wall., 83, 91).

7. *Ledbetter's conveyance to Israel is not evidence of his participation in Baker's fraudulent deed.*

The record shows that in May, 1885, Ledbetter conveyed the land to Israel by a deed reciting the consideration of $10,000 in cash, when in fact no such consideration was paid to him. If this were evidence of a

knowledge of Baker's fraudulent intent, it would prove it at a date some seven months after the making of Baker's deed; but a deed not fraudulent in its inception is not made so by subsequent acts of knowledge (Harden *v.* Wagner, 22 W. Va., 356; Golsworth *v.* Roger Williams Bank, 15 R. I., 586).

8. *There is nothing in the record to convict Israel of participation in or knowledge of Baker's fraud.*

There is no statement concerning Israel's actual notice of Baker's fraudulent intent, nor of any fact from which it could be inferred, except that he paid no consideration to Ledbetter for his conveyance, and that Baker executed to him a quit-claim deed for the land. The word "paid" evidently means that no money consideration passed, and does not exclude the inference that there was other good or valuable consideration for the conveyance. It is not shown to have been a voluntary deed. But even if there were no consideration, that would not avoid the deed (Sparrow *v.* Smith, 5 Conn., 113; Merrian *v.* Harsen, 2 Barb. Ch., 232; Croft *v.* Bunster, 9 Wis., 903; Fonby *v.* Fonby, 34 Ind., 433), and it would be mere evidence of fraud to go to the jury (cases *supra*). The want of consideration does not raise a presumption of fraud in a conveyance (Bennett *v.* McGuire, 58 Barb., 625; Ridgeway *v.* Ogden, 4 Wash., 139), and much less would it warrant the presumption of notice in a vendee twice removed from the fraudulent grantor. However, in Texas the consideration of a deed can only be impeached by a special plea (Newton *v.* Newton, 77 Tex., 508), which does not appear in the case at bar.

As to the quit-claim deed, if Israel took it or had any knowledge of it, which is not stated in the record, it is of no importance, for it is not stated that Baker made

this deed with the intent to defraud his creditors: and to invite the court to infer from it an intent to defraud by Baker, and from that inference to infer a knowledge of such intent by Israel, would be absurd. A quit-claim deed does not deprive the purchaser of his bona-fide character (Chapman *v.* Sims, 53 Miss., 154; Mansfield *v.* Dyer, 131 Mass., 200). It passed whatever interest in the land might remain in Baker by reason of the fact that the notes for the purchase money were not yet due, of which Israel had notice by the recorded deed. If any such interest remained, it was an equitable interest, which would pass by a quit-claim deed (Farmers' L. & T. Co. *v.* McKinney, 6 McLean, 1, 3; Jackson *v.* Hubble, 1 Cow., N. Y., 613); and if made with Israel's knowledge and consent, it was an act of prudence to accept it, whatever may have been the motive of Baker in making it.

From the foregoing, it is submitted that the necessary conclusion of law is that Baker's deeds to Ledbetter and Israel were not fraudulent conveyances.

FOURTH.

THE CONCLUSION OF LAW SHOULD HAVE BEEN THAT, EVEN IF LEDBETTER AND ISRAEL WERE PARTIES TO BAKER'S FRAUD, THE PLAINTIFF WAS A BONA FIDE PURCHASER FOR VALUE, WITHOUT NOTICE, AND TOOK A GOOD TITLE AGAINST BAKER'S CREDITORS.

If the Court should hold that both Ledbetter and Israel were parties to Baker's fraud, nevertheless under the Texas Statute of Frauds (Art. 2465, *supra*), the plaintiff's title is not affected by their fraudulent conveyances "unless it appears that he had notice . . .

of the fraud rendering void the title of such (his immediate) grantor." The agreed statement is explicit as to the plaintiff's want of notice of the fraud alleged, or of any defect in the title, except such as the law imputed to him from the deeds themselves and from Schuler's attachments, and that in good faith he made a loan to Israel, secured by a mortgage on the land, and purchased the land at the foreclosure sale, without being a party to the attachment suit. He therefore had no actual notice of the alleged fraud, and it is equally clear that there was no constructive notice from the deeds or attachment suit.

The attachment suit was not *lis pendens* as to the plaintiff, as has been shown above, even if founded on a fradulent conveyance. Where a creditor attached after the registry of a fradulent deed, and after the attachment the land was sold, and afterwards by the second vendee mortgaged to a bank, on a suit by the judgment creditor to recover the land, it was held that the mortgagee held it free of the attachment lien (Ashland Savings Bank *v.* Mead, 63 N. H., 435). The court remark that the attaching creditor should have enjoined the fraudulent grantee from conveying.

The non-delivery of the deed, as evidence of fraud, was not known to the plaintiff, and its registration was sufficient evidence of its delivery (Rowell *v.* Hayden, 40 Me., 582 585). When one clothes another with an apparently valid title, third persons who rely on it, without notice of defect in it, will be protected against the grantor and those claiming under him (Simpson *v.* Bank, 43 Hun., 156; affirmed, 120 N. Y., 623; McNeil *v.* Jordan, 27 Kans., 7; Link *v.* Page, 72 Tex., 596 Steiffian *v.* Bank, 69 Tex., 513, 518).

The continued occupancy of the land by Baker after date of his deed was not notice of fraud to the plaintiff, for, under the registration laws of Texas, when the vendor's deed is on record a purchaser from the vendee is not bound to inquire further (Eylar *v.* Eylar, 60 Tex., 315). Neither the original owner's retention of the land, nor judgments, nor liens, after registry of the deed, are notice to the purchaser from a fraudulent grantee (1 Smith's Lead. Cas., 9th Am. Ed., 111.

The release of his vendor's lien by Baker was on record, it imported a consideration, it was apparently made because Ledbetter's notes were not due at the date of his conveyance to Israel, and it was obviously no notice to the plaintiff of fraud. It was not found by the court below that it was made with the intent of defrauding his creditors, the consideration for it might have been valuable, and this court is therefore bound to regard it as a bona-fide transaction.

Baker's quit-claim deed to Israel was not notice of fraud to the plaintiff, because it was executed after the warranty deed to Ledbetter and Ledbetter's deed to Israel, and had every appearance of a bona-fide transaction. The court below does not find that it was made with intent to defraud. Further, a bona-fide purchaser is not affected by the fact that a quit-claim deed is a link in the chain of his title (Sbowden *v.* Tyler, 21 Neb., 199 : Chapman *v.* Sims, 53 Miss., 154 ; Deere *v.* Young, 39 Ia., 588; Watkins *v.* Edwards, 23 Tex., 443 ; Sydnor *v.* Roberts, 13 Tex., 598).

That Israel paid no consideration to Baker and Ledbetter for their deeds is immaterial, for it is admitted that the plaintiff had no knowledge of this. Being written instruments, they imported a consideration (Art. 4488, *supra*). Such a deed is void in favor of

creditors against a subsequent bona-fide purchaser for value without notice (Gordon *v.* Haywood, 2 N. H., 202; Bonney *v.* Taylor, 90 Mo., 63), and can only be set aside by creditors on proof that the debtor had no other property at the time of conveyence (Collins *v.* Cook, 40 Tex., 238, 249). Furthermore, the defense, as above shown, must be specially pleaded.

It is not found that Israel's mortgage to the plaintiff was a part of Baker's scheme to defraud his creditors, and if it were it would not be void against the plaintiff without notice of the fraud (Bergen *v.* Producers' Marble Yard, 72 Tex., 53; Moore *v.* Curry, 36 Tex., 669; Murphy *v.* Briggs, 89 N. Y., 446; Cromelin *v.* McCauley, 67 Ala., 542; Keith *v.* Proctor, 8 Baxter, Tenn., 189; Zoeller *v.* Riley, 100 N. Y., 102).

In a word, the decisions are abundant and uniform, in Texas and elsewhere, that a bona-fide purchaser for value, without notice from either a fraudulent grantor or grantee, takes a good title against creditors (Sydnor *v.* Roberts, 13 Tex., 598; Hardy *v.* Broadus, 35 Tex., 668; Simpson *v.* Del Hoys, 94 N. Y., 189; Neal *v.* Gregory, 19 Fla., 356; Fox *v.* Clark, Walk. Ch., Mich., 535; McNab *v.* Young, 81 Ill., 7; U. S. Digest, 1st Series, Title "Fraudulent Conveyances," p. 679; cases cited *supra*). A mortgagee is a bona-fide purchaser within the meaning of the statute of frauds (Murphy *v.* Briggs, 89 N. Y., 446; Coleman *v.* Smith 55 Ala., 368), and may buy in the land at the foreclosure sale under a fraudulent mortgage (New Orleans National Bank *v.* Le Breton, 14 Fed. Rep., 646). That the plaintiff paid value is presumed from the marshal's deed (Blum *v.* Rodgers, 71 Tex., 668).

For these reasons, it is submitted, if it be conceded that Baker, Ledbetter and Israel united in the intent to

defraud, nevertheless the plaintiff is not affected by their fraud, but holds a good title to the land in controversy against Baker's creditors.

Respectfully submitted,

D. A. McKNIGHT,
Attorney for Plaintiff in Error.

Office Supreme Court U. S.
FILED,
OCT 23 1891
JAMES H. MCKENNEY

In the Supreme Court of the United States.

JAMES C. THOMPSON, Plaintiff in Error,

vs.

GEORGE W. BAKER and H. B. SCHULER.

Brief for Defendants in Error.

John F. Worley, Stationer and Printer, Dallas, Texas.

In the Supreme Court of the United States.

JAMES C. THOMPSON, Plaintiff in Error,

vs.

GEORGE W. BAKER and H. B. SCHULER.

Brief for Defendants in Error.

This was an action for trespass to try title to land, commenced by plaintiff in error against defendants in error. The defendant, Schuler, pleaded not guilty, and in reconvention sought a judgment in his favor for the land [Transcript, pp. 1 and 2.] A jury was waived and the facts were found by the court, (pp. 3 and 4,) and upon these facts a judgment was rendered that the plaintiff take nothing by his suit, and, on his plea in reconvention, that the defendant, Schuler, recover of plaintiff the land in controversy.

No assignment of errors was filed below, and this brief for defendants in error is made without having the brief of the plaintiff in error.

There is no bill of exception, but the facts are shown by the finding of the judge.

These findings show the title of plaintiff and defendant, Schuler, and the only issue is: Which is the superior title.

Both parties claim under a common source, to-wit: the defendant, George W. Baker.

The plaintiff's title is as follows:

1. George W. Baker conveyed to Looney Ledbetter by deed dated August 30th, 1884, and reciting a consideration of eight thousand, two hundred and twenty-five dollars, evidenced by three notes, each for one-third of said sum, due respectively September 1st, 1885, September 1st, 1886, and September 1st, 1887. This deed was made to defraud creditors, and particularly the defendant, Schuler, to whom Baker was then indebted in the sum of about ten thousand dollars. The deed was never delivered to Ledbetter, but was placed on record by Baker on September 29th, 1884. Ledbetter was a single man and nephew of Baker, and before and after the date of the deed to him lived on the land with Baker. Ledbetter had about forty head of cattle on the land, and Baker about three hundred.

2. On May 9th, 1885, Ledbetter made and delivered to J. N. Israel a general warranty deed, conveying the land in controversy, reciting a consideration of ten thousand dollars in cash. On the same day, Baker executed a release of his vendor's lien, and on May 11th, 1885, Baker made to Israel a quit-claim deed to the land; and these three instruments were placed on record on May 14th, 1885. For none of these conveyances did Israel pay Baker or Ledbetter any consideration whatsoever.

3. On August 1st, 1885, plaintiff loaned Israel fiv-

thousand dollars, for which he received Israel's notes secured by mortgage upon the land in controversy. The mortgage was afterward foreclosed and, under order of sale, sold, and the plaintiff purchased. And

4. The marshal's deed, dated August 1st, 1886, constituted the last link in plaintiff's title.

At the date of plaintiff's mortgage, and on the faith of it, plaintiff loaned and advanced to Israel five thousand dollars in cash, and knew nothing of the fraud between Baker and Ledbetter, nor of the fact that Israel had paid no consideration for the land. He was an innocent purchaser, unless affected with constructive notice of Schuler's attachment lien. Schuler was not a party to the suit foreclosing Thompson's mortgage.

The title of the defendant, Schuler, is proved from a common source as follows:

1. September 24th, 1884, Schuler, on his demand aforesaid for ten thousand dollars, instituted suit in the District Court of Clay County, Texas, against Baker and others, and, on the same day, sued out an attachment and the writ was on the same day levied upon the land in controversy, the property of Baker. This suit was, on the application of Schuler, removed to the Circuit Court of the United States for theNorthern District of Texas, where the transcript was filed December 4th, 1884. On the next day, Schuler sued out, in this court, another writ of attachment in the same case, and it, on the same day, was levied upon the land in controversy, as the property of Baker. On January 12th, 1886, judgment was rendered in that case in favor of Schuler,

against Baker and others, for the debt sued on, with foreclosure of attachment lien issued out of the Circuit Court December 5th, 1884. The judgment recites that the attachment lien, as it existed December 5th, 1884, is foreclosed. The writ issued in the State court prior to the removal of the case was not foreclosed. Upon the judgment of the Circuit Court, an order of sale issued, and a sale was made June 1st, 1886, at which Schuler became the purchaser, and a deed was made to him by the marshal, which deed was recorded June 4th, 1885.

It will be observed that, at the date of the issue of attachment from the Circuit Court, December 5th, 1884, the land in controversy had been conveyed by Baker to Ledbetter, and the apparent title was then in Ledbetter, subject to a reserved vendor's lien in favor of Baker. That conveyance being fraudulent, the title, as to Schuler and other creditors, remained in Baker. As the attachment was levied before the plaintiff advanced his money and received a mortgage upon the land, it secured to Schuler a prior right, of which the plaintiff was compelled to take notice. The case of Hancock vs. Henderson (45 Texas, 479), is identical with this in its leading facts, and, we submit, requires an affirmance of the judgment below. The levy upon the real estate could only be made by an endorsement upon the writ: the facts found by the court show a valid levy in this case. The law neither authorized nor required any registration of the levy. The levy constituted a taking of the property. It was in the constructive custody of the law, and plaintiff could not afterward acquire a lien upon it, or an in

terest in it, except in subordination to the lien and rights secured by the levy of the writ of attachment in the suit of the defendant, Schuler.

Respectfully submitted for defendants in error.

Laurie Roberson

Counsel for defendants in error